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INTEGRITY INVESTMENT GROUP, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN R. MCLEAN,

Plaintiff,

v.

WORLD SAVINGS FSB; INTEGRITY
INVESTMENT GROUP, LLC; GOLDEN
WEST SAVINGS ASSOCIATION
SERVICE CO.; SUSAN FEDERIGHI; BILL
FORD; JEFFREY FORD; CALIFORNIA
FRANCHISE TAX BOARD; WILLIAM L.
VEEN,

Defendants.____

No. 07-05594 JSW

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
DISMISS [RULES 12 (b)(1) and
12(b)(6)]**

Date: February 29, 2008

Time: 9:00 a.m.

**Courtroom: Hon. Jeffrey S. White,
Courtroom 2, 17th Floor**

1. Introduction and Summary of Arguments

Plaintiff filed this action originally on November 2, 2007. The operative pleading is the First Amended Complaint, filed December 7, 2007, and served in January 2008 on this defendant. The First Amended Complaint states four claims for relief: To Set Aside a Non Judicial Sale; Declaratory Relief; to Quiet Title and for Wrongful Eviction. The moving defendant is a third party purchaser at a foreclosure sale held in October 2007, in which

1 defendant purchased plaintiffs former property, a single family dwelling in Woodside,
 2 California. As to this defendant, the First Amended Complaint claims that the sale should be set
 3 aside due to the “ fraud” of the original lender, World Savings, and the foreclosure trustee,
 4 Golden West Savings Association Service Company. The First Amended Complaint seeks a
 5 declaration that Integrity Investment Group has no interest in the real property and to quiet title
 6 against its interest. It also seeks to restrain pending eviction proceedings in San Mateo Superior
 7 Court, under state law pursuant to California Code of Civil Procedure §1161a.

8 In response to the service of the First Amended Complaint, this Defendant moves to
 9 dismiss on two grounds. First, under FRCP Rule 12(b)(1), defendant submits that the court is
 10 without subject matter jurisdiction to hear and determine the claims against this defendant because
 11 there is no federal question or other federal subject matter jurisdiction over the alleged state law
 12 non-judicial foreclosure or eviction action. Second, pursuant to FRCP Rule 12(b)(6), and only if
 13 the court determines that it has jurisdiction, defendant contends that under California law, the
 14 complaint fails to state a claim for relief against this defendant because it is a bona fide third party
 15 purchaser for value at the sale, so that there is no substantive claim regardless of jurisdictional
 16 issues.

17 The court is also advised that the eviction action discussed in the First Amended Complaint
 18 is the subject of a Notice of Removal to this Court under a case entitled Integrity Investments, LLC
 19 v. McLean, No. 07-06621, pending before Judge Patel. That action is the subject of a motion to
 20 remand which will be heard on January 28, 2008.

21 **2. Procedural History and Facts**

22 Defendant originally filed an eviction action on October 19, 2007 in the San Mateo
 23 Superior Court for unlawful detainer under California Code of Civil Procedure § 1161a, to recover
 24 possession of a single family dwelling and land commonly known as 481 West Maple Way,
 25 Woodside, California 94062. (First Amended Complaint [hereafter “FAC”], ¶¶ 32-36 and Exh. E,
 26 F). As the First Amended Complaint alleges, there was a foreclosure sale of the defendant’s
 27 property on October 3, 2007, at which plaintiff, a third party bidder, was the successful purchaser.
 28

1 Defendant is a hold over owner who is refusing to give up possession. (FAC, ¶¶ 3, 12-18; 33-36
2 and Exh. B, E and F).

3 The First Amended Complaint alleges unspecified irregularities in the sale (FAC, ¶¶ 4, 17-
4 18; 21; 35) which plaintiff contends violated his "due process" rights, such that it presents an action
5 "under 42 U.S.C. § 1983." (FAC, ¶ 10). Plaintiff contends that "selling Plaintiff's property without
6 notice is a violation of the Due Process afforded Plaintiff under the Fourteenth Amendment of the
7 United States Constitution..." (FAC ¶ 10; see also FAC ¶ 35).

8 **3. Dismissal for Lack of Subject Matter Jurisdiction.**

9 In this case, the basis for federal question jurisdiction against this defendant is allegedly the
10 notice to quit and unlawful detainer complaint which plaintiff challenges as a "Wrongful
11 Eviction." (FAC, ¶¶ 32-36 and Exhibits E and F). Defendant alleges that the federal question arises
12 as a civil rights violation under 42 U.S.C. 1983 (FAC ¶ 10), but the First Amended Complaint
13 states only four purely state-law based claims.

14 The instant motion seeks dismissal for lack of federal question jurisdiction under FRCP
15 Rule 12(b)(1). Federal question jurisdiction exists only when the plaintiff's "well-pleaded complaint
16 establishes either that federal law creates the cause of action or that the plaintiff's right to relief
17 necessarily depends on resolution of a substantial question of federal law." (Franchise Tax Board
18 v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841
19 (1983);

20 In the related situation where subject matter jurisdiction is challenged on a motion to
21 remand, the court ordinarily will determine jurisdiction from the four corners of the complaint as
22 it existed on the date of removal, as well as any pertinent facts in the Notice of Removal. (Miller
23 v. Grgurich 763 F.2 372, 373 (9th Cir. 1985; Gaus v. Miles, Inc. 980 F.2 564, 567 (9th Cir. 1992). The
24 facts justifying removal must appear on the face of the pleadings. (Rath Packing Co. v. Becker 530
25 F.2 1295, 1303-1304 (9th Cir. 1975).¹

26
27 ¹ Plaintiff further asserts that the Deed of Trust between him and World Savings specifies
28 that federal law will apply to its provisions. (FAC ¶ 10 and Exh. A). However, plaintiff is not a
party to that contract; defendant does not even allege it.

1 If the operative facts of this action pertain to the sale, there is no federal question. First,
 2 the Ninth Circuit long ago held that irregularities in sales under Civil Code § 2924b do not support
 3 a claim under the 14th Amendment so as to admit the case to federal court. (Davidow v. Lachman
 4 Bros. Investment Co. 76 F2 186, 188(9th Cir. 1935)). Later decisions of the California Supreme
 5 Court and other courts reiterate that claims based on irregularities in trustee's sales under Civil
 6 Code § 2924b do not involve federal law or the United States Constitution, or related provisions
 7 under the California Constitution. (Garfinkle v. Superior Court 21 C3 268, 276-280 (1978);
 8 Lancaster Security Investment Corporation v. Kessler 159 CA2 649, 654-655 (1958)). These
 9 decisions have held that such sales do not involve state action, but only contractual remedies, and
 10 hence, neither the procedures themselves nor non-compliance with them impact due process or the
 11 14th Amendment.

12 In a similar vein, the Eight Circuit in McNeil v. Franke 171 F3 561, upheld the dismissal
 13 for lack of federal question jurisdiction of a challenge to a judicial foreclosure action seeking, as
 14 the complaint does here, cancellation of a sale and quiet title:

15 When, as here, the rights involved are rooted in state law, the presence of a
 16 collateral federal issue does not transform the action into a federal case. [Citation
 omitted]

17 In conclusion, state law controls the outcome of this garden-variety quiet title,
 18 breach of contract, and judicial foreclosure action. McNeill will win or lose on the
 playing field of state law. Her case does not belong in the federal arena. We thus
 affirm the district court's dismissal for lack of federal subject matter jurisdiction.

19 (171 F3 at 564).

20 The resolution of the regularity of the sale is purely a state law question properly brought before
 21 the courts of California.

22 The same holds true for the eviction arising from the sale. In this case, the routine unlawful
 23 detainer complaint attached to the First Amended Complaint (Exh. F) pleads no federal question
 24 at all, and defendant cannot inject a federal issue by stating it as a potential defense. Generally,
 25 landlord tenant and unlawful detainer actions are matters purely of state law. (Powers v. United
 26 States Postal Service 671 F2 1041, 1045 (7th Cir. 1982). The federal courts in the Ninth Circuit
 27 have found subject matter jurisdiction lacking when a defendant attempts to remove a state law
 28

unlawful detainer action to federal court. (See e.g., Round Valley Indian Housing Authority v. Hunter 907 F.Supp. 1343, 1348 (N.D. Cal. 1995); Cooper v. Washington Mutual Bank 2003 U.S. Dist. Lexis 4559 (N.D. Cal. 2003) (Per Judge Walker: “An unlawful detainer does not raise a question arising under federal law and so, once removed, must be remanded for lack of jurisdiction.”).

The present action, amended once, still contains no specific allegations of wrong doing, and no theory of recovery that depends on federal statutory or constitutional law. Therefore, it is appropriately dismissed under FRCP Rule 12(b)(1).

4. Dismissal Under Rule 12(b)(6)-No Claim for Relief Stated.

Even if this court were to retain jurisdiction of this case against Defendant and the other parties, it is appropriately dismissed at this stage under FRCP Rule 12(b)(6) which provides for dismissal of an action for “failure to state a claim upon which relief can be granted .”

In this case, the First Amended Complaint, shows that there is no claim under state law against plaintiff. The complaint on its face avers that there was a non-Judicial sale and that this defendant was the successful bidder. It alleges that Integrity Investment’s interest derives from a recorded Trustee’s Deed Upon Sale. (FAC, ¶ 3 and Exh. B). It alleges that the sale enforced default provisions under a deed of trust conveyed to the trustee for the benefit of a third party lender, World Savings. (FAC 12-18 and Exh. A, B, C,).

The California courts have made it very clear that a third party purchaser at a sale is a bona fide purchaser. By statute, this presumption of a regular sale recited in a recorded Deed of Trust Upon Sale is **conclusive** in favor of a bona fide purchaser. (Civil Code Section 2924). As the court stated in 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 CA4 1279, 1286:

Aside from the common law presumption of validity..., Civil Code section 2924 contains a statutory presumption "aris[ing] from the recital in the trustee's deed that all statutory requirements for notice of default and sale have been satisfied. This presumption is prima facie evidence of compliance and **conclusive** evidence of compliance in favor of a bona fide purchaser or encumbrancer."...

(Emphasis original). The conclusive presumption under Civil Code § 2924 is one “that *requires*

the trier of fact to find that the presumed fact exists” from a finding of the existence of the basic fact. The presumption is conclusive “because the adverse party against whom it operates *is not permitted* to introduce evidence to contradict or rebut the existence of the presumed fact.” (Wolfe v. Lipsey (1985) 163 CA3 633, 639-640 (Italics in original). If such presumption applies, the sale is properly conducted for all purposes between the trustor and the bona fide purchaser, and constitutes a final adjudication of the rights of the borrower and lender. (Smith v. Allen (1968) 68 C2 93, 96; Moeller v. Lien (1994) 25 CA4 822, 830-833; Vella v. Hudgins (1977) 20 C3 251, 255).

As against trustee’s and beneficiaries, the California courts have held that the duties described in the foreclosure statutes are exclusive, and cannot be extended by judge-made implied duties. The legislation creating non-judicial foreclosure processes prevents the courts from imposing additional common law or judicially-created duties on the trustee or the beneficiary. (I.E. Associates v. Safeco Title Insurance Co. (1985) 39 C3 281, 284-288). The court stated:

The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited by the contract of the parties and the statutes.....

In short, there is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes. There are,...., persuasive policy reasons which militate against a judicial expansion of those duties. The nonjudicial foreclosure statutes--an alternative to judicial foreclosure--reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees. Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation.

(39 C3 at 288; see also Perez v. Sutter Street Partners (1990) 222 CA3 938, 945-949; Moeller v. Lien, supra, 25 CA4 at 830-833).

Furthermore, an action to set aside a sale under a power of sale in a deed of trust is an action in equity. (Raedeke v. Gibraltar Savings & Loan Assn. (1974) 10 C3 665, 671). When a trustor seeks to set aside the sale, he is required, as in other equitable cases, to do equity before the court will exercise its equitable powers. Therefore, the viability of the action depends upon the trustor's

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2 payment or offer to pay the secured debt either before commencement of the action or in the
3 complaint. (MCA, Inc. v. Universal Diversified Enterprises Corp. (1972) 27 CA3 170, 177).
4 (Karlsen v. American Savings and Loan Association (1971) 15 CA3 112, 1117-118, 120-121). In
5 order to validate the action, the tender must be more than formal; it must be realistic and
6 performable. Moreover, the tender must be unconditional. (California Civil Code § 1494;
7 Gaffney v. Downey Savings & Loan Assoc. (1988) 200 CA3 1154, 1168; Wiener v. Van Winkle
8 (1969) 273 CA2 774, 782.) The lack of a tender or the inability to make good on a purported
9 tender has often supported a defendant's summary disposition of an action to set aside a trustee's
10 sale. (See, Karlsen, supra [judgment on the pleadings]; MCA, Inc. v. Universal Diversified
11 Enterprises Corp., supra, [summary judgment]; Carpenter v. Hamilton (1943) 59 CA2 146, 151-
12 152 [demurrer].)

13 The plaintiff's allegations show that a Trustees Deed reciting the regularity of the sale was
14 duly recorded, thus admitting a conclusive presumption in favor of this defendant. In addition, the
15 plaintiff has in no way offered tender to any of the defendants or other parties who had interests
16 in the property. In fact, he seeks to quiet title exclusive of any of the lines against there property
17 (FAC ¶¶ 29-31). According to his own allegations, this would result in a \$2.4 million windfall to
18 plaintiff. (FAC ¶ 31). For the foregoing reasons, it is extremely doubtful that the plaintiff has a
19 claim against the any defendant. The moving defendant is entitled to a conclusive presumption as
20 a third party purchaser, that as against it, the sale was regularly conducted. Therefore, if the court
21 retains jurisdiction, the case should be dismissed as to Integrity Investment Group on substantive
22 grounds.

23 **5. Conclusion.**

24 For the foregoing reasons, the court should grant the motion, and dismiss this case as
25 against Integrity Investment Group, LLC.

26 Dated: January 23, 2008

LAW OFFICES OF MARK J. ROMEO

27 By /s/Mark J. Romeo
28 MARK J. ROMEO
Attorneys for Plaintiff

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within action; my business address is 130 Sutter Street, 7th Floor, San Francisco, CA 94104.

On January 23, 2008, I served the foregoing document(s) on the interested party(ies) in this action by placing a true copy XX the original of said document(s) in a sealed envelope(s) addressed as stated below and

BY MAIL

x I deposited such envelope(s) in the mail at San Francisco,

I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Under that practice, the mail would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY PERSONAL SERVICE

_____ Personally hand delivered said document(s) to addressee

_____ I caused said document(s) to be served via personal service

BY OVERNIGHT MESSENGER

_____ I caused said document(s) to be served by for next-day delivery, by agreement with tenants

BY FACSIMILE

_____ And I faxed such document(s) to telephone number. A transaction report confirming a successful transmission was obtained.

BY certified or registered mail

_____ I deposited such envelope(s) in the mail at San Francisco, California with the U.S. postal service on that same day with postage thereon fully prepaid, certified mail, return receipt requested.

PARTY(IES) SERVED:**Plaintiff**

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Defendants Bill Ford, Jeffrey Ford, Susan Federighi

BILL FORD

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DOCUMENT(S) SERVED:**Not of Motion and Motion****Memo P&A****Proposed Order**

x I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 23, 2008 at San Francisco, California.

Mark J. Romeo
Type or Print Name

/s/ Mark J. Romeo
Signature